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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHEILA JACKSON STOSSIER,
Petitioner,

v.

GERHARD SIMON STOSSIER

Petition for a Writ of Certiorari to the Court of Appeals of Virginia

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nothing in respondent's brief in opposition ("Opp.") detracts from the reasons set forth in the Petition why further review by this Court is warranted.

1. Respondent's attempt to dismiss the square conflict of authority created by the Court of Appeals' refusal to apply the controlling federal statute is entirely unavailing. Respondent apparently concedes the PKPA's applicability here and, thus, the manifest error of the Court of Appeals' ruling that the PKPA "applies only if the Virginia court was enforcing or modifying a custody determination of a court of [another] state." App. at 3a.[1] Further, respondent also concedes that, at least in some instances, section 8(d) dictates that a court no longer has jurisdiction to modify its prior custody determination "if all parties have since left the state." Opp. at 6.

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[1] References to the Appendix to the Petition for a Writ of Certiorari are denoted as "App."

Thus, to support his argument that section 8(d) does not control this case, respondent is left to suggest, without benefit of analysis or citation, that section 8(d) "is reasonably read not to come into play until *after* the court has made a final custody determination." Opp. at 5 (emphasis by respondent).

Specifically, respondent suggests that *Long v. Long*, 439 N.W.2d 523 (N.D. 1989), and *Dahlen v. Dahlen*, 393 N.W.2d 765 (N.D. 1986), are distinguishable because both of those cases concerned a "new action for modification" following the entry of a "final" custody order. Opp. at 6. By contrast, respondent suggests that, because the Virginia court's initial order granting custody to petitioner was merely a non-final step in a "single, ongoing proceeding," section 8(d) did not preclude that court from entertaining respondent's subsequent motion for modification the next year, even though the parties had moved away long before respondent's motion. *Id.* at 5.

Respondent's alleged distinction is without any basis either in law or fact and, in any event, is irrelevant under the PKPA. Contrary to respondent's assertion, the custody modification proceedings in *Long* and *Dahlen* were *not* considered to be "new" as opposed to "ongoing" proceedings. Rather, the trial courts in all three of these cases purported to exercise ongoing jurisdiction under the terms of their prior custody decrees. *Long*, 439 N.W.2d at 523; *Dahlen*, 393 N.W.2d at 766; App. at 3a.[2]

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[2] Indeed, this case is substantially indistinguishable in all material respects from both *Long* and *Dahlen*. In all three cases (1) the parties resided in the forum state at the commencement of the custody proceeding; (2) the parties left the forum state after the trial court's initial exercise of jurisdiction; (3) the trial court, upon rendering an initial custody decree, purported to retain continuing jurisdiction to conduct further proceedings; (4) the noncustodial parent subsequently petitioned the same court for a modification of custody rights; and (5) that court asserted jurisdiction to modify its earlier decree, even though the parents and children no longer resided in the forum state when the modification was sought.

More importantly, respondent's characterizations of purportedly "final" custody orders, "new action[s] for modification," and "single, ongoing proceeding[s]" are afforded no jurisdictional significance under the PKPA's statutory scheme. The PKPA simply does not distinguish between "ongoing" and "new" proceedings in the same court, and does not recognize the concept of "final" custody determinations. Rather, section 8(d) must be consulted *whenever* a court purports to modify its prior custody determination, *however characterized.*[3] Indeed, the PKPA expressly provides that custody determinations governed by section 8 "include[] permanent and temporary orders, and initial orders and modifications." 28 U.S.C. § 1738A(b)(3). Simply stated, a trial court's mere intention to retain jurisdiction to conduct "ongoing" proceedings in disregard of the underlying jurisdictional facts cannot supersede the requirements of the PKPA. *See Long*, 439 N.W.2d at 525; *Dahlen*, 393 N.W.2d at 766-67 n.1.[4]

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[3] Contrary to respondent's suggestion (Opp. at 5 n.4), petitioner readily agrees that the PKPA allows a court, once vested with valid jurisdiction, to render a custody determination even though all parties have left the forum state since the action was initiated. The PKPA, however, *does not* allow the trial court in that situation *sugsequently* to modify its determination, when all of the parties have moved out-of-state *before the modification is sought. See* 28 U.S.C. § 1738A(d).

[4] Respondent ignores the other conflicting authority from various jurisdictions that was cited in the Petition. Most strikingly, respondent dismisses the ruling in *Yurgel v. Yurgel*, 572 So. 2d 1327 (Fla. 1990), as "irrelevant." Opp. at 6 n.5. To the contrary, the Court of Appeals' refusal to enforce the requirements of the PKPA cannot be reconciled with the Florida Supreme Court's pronouncement, on the issue of a Florida trial court's continuing authority to entertain a party's subsequent motion for custody modification, that such authority continues, *inter alia*, until "jurisdiction is terminated by operation of the PKPA." 572 So. 2d at 1332. Moreover, respondent fails even to address the inescapable conflict created by the Court of Appeals' pronouncement and those of numerous other courts, in varying factual situations, that section 8(d) governs

2. Respondent does not dispute the acute importance of the uniform application of the PKPA, both to the children and parents embroiled in interstate custody disputes and to the constitutional supremacy of federal law. Instead, respondent suggests that the questions presented are "largely academic." Opp. at 7.[5] Specifically, respondent argues that if this Court were to vacate the custody order at issue, "the case would return to the same Virginia circuit court, which would then reinstate the now-prevailing custody arrangement." *Id.* at 8. This unfounded assertion is wrong for at least two reasons.

First, respondent incorrectly assumes that Virginia would be the proper forum for any later proceeding. In fact, if the status quo were reinstated by this Court, the residence of petitioner—the custodial parent under the prior decree—and thus the daughter, would be Maryland. Maryland, therefore, well might be deemed the proper forum to make any future custody determination. *See generally* Md. Code Ann. §§ 9-201 to -224 (1984) (Maryland version of Uniform Child Custody Jurisdiction Act ("UCCJA")); Va. Code Ann. §§ 20-125 to -146 (1990) (Virginia version of UCCJA); 28 U.S.C. § 1738A(c), (d), (f).[6]

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a court's jurisdiction to modify its own prior custody determination. *See* cases cited in Petition at 8 & nn.7-8.

[5] Respondent also attempts to minimize the importance of the questions presented by noting that the Court of Appeals' decision was unpublished. Regardless of the method by which the Court of Appeals chose to announce its decision, one salient fact remains: That court—and the Virginia Supreme Court by acquiescence—have blatantly flaunted their disregard for federal law and Congress' stated intent "to establish *national standards* under which the courts . . . will determine their jurisdiction to decide [child custody] disputes." Pub. L. No. 96-611, § 7(b), 94 Stat. 3566, 3568 (emphasis added).

[6] In essence, respondent suggests that proper jurisdiction was created in Virginia when the father returned to live there with the daughter. This circular argument overlooks the fact—which must be assumed for purposes of respondent's argument—that the daugh-

Second, even if the case returned to Virginia, the outcome of any future proceeding would be far from certain. In that event, Virginia law would require a trial court to reassess the prior decree "as the circumstances of the parents and the benefit of the child[] may require." Va. Code Ann. § 20-108 (1990). Because evidence has not yet been educed regarding all of the changed circumstances over the past two years, respondent's prediction in this regard is entirely unwarranted. In any event, respondent's mere speculations cannot diminish the pressing need for authoritative guidance in defining the lower courts' obligations to accommodate the weighty federal and state interests addressed by the PKPA.

3. Finally, respondent argues that the decision below is not worthy of this Court's review because the Court of Appeals "suggested an alternative jurisdictional basis" validating the custody modification—namely, section 8(c)(2)(D) of the PKPA.[7] This argument also is unavailing for several reasons.

First, as is evident upon reading, the Court of Appeals *nowhere* cited section 8(c)(2)(D) in its opinion—in fact, the court expressly found that the PKPA *did not*

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ter's residence in Virginia is based upon the trial court's *unauthorized* custody transfer. Clearly, the daughter's improper presence in Virginia cannot serve to validate the erroneous decision that caused it.

[7] Section 8(c)(2)(D) provides that:

> A child custody determination made by a court of a State is consistent with the provisions of this section only if[, *inter alia*,]:
>
> > (D)(i) it appears that no other State would have jurisdiction under [the other provisions of section 8(c)(2)], or another State has declined to exercise jurisdiction *on the ground that the State whose jurisdiction is at issue is the more appropriate forum to determine the custody of the child*, and (ii) it is in the best interest of the child that such court assume jurisdiction.

28 U.S.C. § 1738A(c)(2)(D) (emphasis added).

apply in cases such as this. Moreover, even if section 8(c)(2)(D) were applicable, its criteria were not met in this case. Specifically, the District of Columbia court's dismissal of petitioner's pending proceeding on December 19, 1988—*after* respondent initiated the Virginia custody modification proceeding, *after* the modification hearing, and on *the same day* that the Virginia court issued its opinion—was rendered well beyond the time at which the Virginia court was required to determine whether it had continuing jurisdiction and, thus, is irrelevant as a matter of law.[8] Further, the District of Columbia dismissal without prejudice is not the type that would vest Virginia with jurisdiction even under respondent's interpretation of the PKPA, because the District of Columbia court nowhere indicated that its order was based "on the ground that [Virginia was] the more appropriate forum to determine the custody of the child." *See* 28 U.S.C. § 1738A(c)(2)(D). Respondent concedes (Opp. at 7) that "the D.C. Superior Court did not expressly determine that Virginia was a 'more appropriate forum.'" Respondent's strained suggestion (*id.*) that the District of Columbia court nevertheless "so implied" is itself contrary to the decision in *Long v. Long*, 439 N.W.2d at 525-26.[9]

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[8] The criteria supporting child custody jurisdiction under the PKPA must be present at the *commencement* of the relevant proceeding—in this case, the Virginia modification proceeding initiated in September 1988—occurrences later in time being irrelevant to the inquiry. *See, e.g., In re B.B.R.*, 566 A.2d 1032, 1038-40 (D.C. 1989); *cf. Rexford v. Rexford*, 631 P.2d 475, 478 (Alaska 1980) (interpreting UCCJA).

[9] Indeed, the District of Columbia court apparently was not even apprised of the jurisdictional issues in this case. Thus, the District of Columbia court's unnecessary dismissal may be explained by respondent's failure to inform the Virginia court in September 1988 of the pending District of Columbia action (as required by Va. Code Ann. § 20-132(A)(2), (C)) and the Virginia court's resultant failure to make inquiries of and consult with the District of Colum-

Although the federal and state courts have been called upon in scores of cases to interpret—with varying results—the jurisdictional provisions of the PKPA, this Court has had little opportunity to lend its authoritative guidance. Given the square conflict of authority created by the Court of Appeals' misinterpretation of those provisions, and the resultant challenge to the uniform application and supremacy of federal law, this case presents the opportunity for much needed clarification. The petition for a writ of certiorari, therefore, should be granted.

Respectfully submitted.

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bia court concerning the jurisdictional issues (as required by Va. Code Ann. § 20-129). Instead, respondent *incorrectly* informed the District of Columbia court that the Virginia court had "ongoing" jurisdiction." Joint Appendix filed with the Court of Appeals of Virginia on June 23, 1989, at 27b-27g.